

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SHARON L. PALMER,

Plaintiff,

v.

SENTINEL INSURANCE COMPANY
LTD,

Defendant.

CASE NO. C12-5444 BHS

ORDER REQUESTING
ADDITIONAL BRIEFING AND
RENOTING MOTION

This matter comes before the Court on Plaintiff Sharon Palmer's ("Palmer") motion to compel (Dkt. 22). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby grants the motion for the reasons stated herein.

I. PROCEDURAL & FACTUAL BACKGROUND

On April 27, 2012, Palmer filed a lawsuit against Sentinel Insurance Company, Ltd. ("Sentinel") in Pierce County Superior Court. Dkt. 4 at 6-9. On May 18, 2013, Sentinel removed the action to this Court on the basis of diversity jurisdiction. *See* Dkt.

1 2. Palmer's complaint contains allegations for breach of contract, violations of the
2 insurer's duty of good faith by its denial of coverage for a burglary and fire occurring on
3 her property; violations of the Consumer Protection Act; breach of statutory and
4 regulatory duties under Washington State statutes and codes; unreasonable denial of her
5 claim for coverage; and for extreme and outrageous conduct based on the foregoing
6 alleged unlawful conduct. Dkt. 4 at 7-8.

7 On May 25, 2013, Sentinel answered, pleading affirmative defenses which, in
8 part, include that Palmer's claims are barred in whole or in part by Palmer's violation of
9 their insurance policy relating to fraud and concealment, unclean hands, and violations of
10 RCW 48.135.005, et seq., intentional concealment, misrepresentation, or fraud, relating
11 in part to Palmer's misrepresentations regarding the value of her personal possessions,
12 that her property was the subject of burglary, and that she was not involved in the fire that
13 damaged the property at issue. Dkt. 11 at 4.

14 On April 29, 2013, Palmer filed the instant motion to compel, seeking to compel
15 disclosure of (1) alleged attorney-client privileged or work product documents and (2)
16 alleged propriety or commercial information as well as (3) to overrule objections and
17 compel responses to multiple Requests for Production ("RFPs"). Dkt. 22. On May 13,
18 2013, Sentinel responded in objection to Palmer's motion. Dkt. 25. On May 17, 2013,
19 Palmer replied. Dkt. 27.

20 On May 23, 2013, the Court held a telephonic hearing on Palmer's motion. Dkt.
21 30. During the hearing, with regard to the alleged proprietary and commercial
22 information, the Court directed the parties to review this district's model protective order

1 and consider filing a stipulated protective order. *Id.* The parties did so. Dkt. 34. With
2 regard to the RFPs not involving attorney-client privilege or work product documents, the
3 Court directed the parties to meet and confer. Finally, the Court ordered the parties to file
4 individual briefs on the standards applicable to disclosure of the documents withheld
5 pursuant to the attorney-client privilege and work product doctrine in bad faith insurance
6 actions as articulated by the Washington State Supreme Court in *Cedell v. Farmers Ins.*
7 *Co.*, 176 Wn. 2d 686, 698-99 (2013). The Court also ordered Sentinel to file the
8 documents withheld on the aforementioned bases for in camera review. Dkt. 34. Thus,
9 the only remaining issue in this motion to compel involves the production of alleged
10 attorney-client privileged and work product documents.

11 II. DISCUSSION

12 A. Legal Standards

13 The Washington Supreme Court has attempted to clarify the scope of the attorney-
14 client privilege and work product protection for an insurer in a bad faith claim from its
15 insured. The court held in *Cedell* that when an insured brings a bad faith claim, attorney-
16 client privilege and work product protections are presumptively inapplicable to the
17 insurer's claim-adjustment communications. An insurer may overcome the presumption
18 “by showing its attorney was not engaged in the quasi-fiduciary tasks of investigating and
19 evaluating or processing the claim, but instead in providing the insurer with counsel as to
20 its own potential liability; for example, whether or not coverage exists under the law.” *Id.*
21 at 699. The *Cedell* Court was not content to allow the insurer to merely assert claims of
22 privilege, it “entitled” the insurer “to an in camera review of the claims file, and to the

1 redaction of communications from counsel that reflected the mental impressions of the
2 attorney to the insurance company, unless those mental impressions are directly at issue
3 in its quasi-fiduciary responsibilities to its insured.” *Id.*

4 **B. Application of the Standards**

5 The Court has performed an in camera review of the documents submitted by
6 Sentinel in Exhibit B (Dkt. 33-1). Based on the documents before the Court, it finds
7 many of the documents are duplicative of one another, as some are reproduced and
8 included in communications to various persons. Additionally, the Court finds Sentinel’s
9 attorney Dana Ferestien may have performed quasi-fiduciary duties for Sentinel in this
10 case as well as provided advice about potential liability and coverage under the Palmer’s
11 policy with Sentinel in her capacity as counsel. Sentinel has never argued the contrary in
12 its responses. *See* Dkts. 25 and 32. Prior to the initiation of the present lawsuit in 2012,
13 it seems that Ferestien was engaged in the investigation by interviewing witnesses and
14 perhaps in retaining and directing experts to investigate the claim. Ferestien also clearly
15 acted in the role of counsel in assessing information as the investigation progressed in
16 order to provide Sentinel with updated liability and coverage assessments.

17 Despite Palmer’s assertion to the contrary (Dkt. 35 at 5), under *Cedell*, attorneys
18 are apparently not prohibited from performing mixed duties, although the information an
19 attorney gathers in performing quasi-fiduciary tasks is never covered by the attorney-
20 client privilege. *Cedell*, 176 Wn. 2d at 699, n. 5 and 702. However, as this Court
21 interprets *Cedell*, in cases involving allegations of bad faith in the investigation,
22 processing or handling of an insured’s claim, where an attorney acts both in a quasi-

1 fiduciary capacity by, for example, involving him or herself in the investigation or its
2 supervision, and as counsel advising its client about potential liability, including coverage
3 issues, the attorney-client privilege and work-product protections are likely to be waived
4 in many, if not most cases. *Cedell*, 176 Wn. 2d at 700. This is so because counsel's legal
5 analysis and recommendations to the insurer regarding liability generally or coverage in
6 particular will very likely implicate the work performed and information obtained in his
7 or her quasi-fiduciary capacity. Although *Cedell* seems to offer a workaround for
8 attorneys who may act in dual capacities by suggesting in the footnote cited above (*see*
9 *supra*) that attorneys who engage in mixed roles should keep separate files for actions
10 taken in each capacity, that suggestion is likely not workable in many cases. The *Cedell*
11 court's suggestion will likely *not* provide a practical solution for many attorneys working
12 in dual capacities because the file containing counsel's legal advice is very likely to
13 contain the mental impressions directly at issue in the information contained in the other
14 file where the attorney stores the information gathered in the course of executing his or
15 her quasi-fiduciary duties.

16 Because Ferestien appears to have performed quasi-fiduciary duties, the
17 documents submitted to this Court as Exhibit B containing her legal advice, even those
18 relating to coverage, appear to have been waived because her "mental impressions are
19 directly at issue in" Sentinel's "quasi-fiduciary responsibilities to its insured." *Cedell*,
20 176 Wn. 2d at 699. If this is so, Palmer is entitled, without redaction, to all the
21 documents included in Exhibit B containing Ferestien's impressions regarding the
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1 insurer's quasi-fiduciary duties to the insured, including her liability assessments and
2 coverage advice. *Cedell*, 176 Wn. 2d at 699 and 702.

3 In Exhibit B, the Court also identified email communications with attorney
4 Rodney C. Short ("Short"), who, based on the information in the record, does not appear
5 to have been involved in quasi-fiduciary functions in this case, and thus the attorney-
6 client privilege would likely not be waived. However, the Court is uncertain about
7 whether Short participated in any quasi-fiduciary duties, especially where the parties have
8 brought no other information about the nature of his work on Palmer's claim to the
9 Court's attention. Additionally, Sentinel admits in its response that:

10 Sentinel's attorneys did engage in activities to assist Sentinel in fulfilling its
11 quasi-fiduciary obligations. Specifically, Sentinel's attorneys examined
12 witnesses, communicated with Plaintiff's attorneys and her Public Adjuster,
analyzed Plaintiff's claimed losses, etc., all before Sentinel reached its final
coverage decision.

13 Dkt. 32 at 3-4. Palmer essentially maintains that based on this admission by Sentinel,
14 Palmer is entitled to all documents withheld by the insurer because Palmer interprets
15 Sentinel's response to mean that all of the attorneys involved in the case participated in
16 Sentinel's quasi-fiduciary tasks. Dkt. 35 at 2. If Short acted only in a quasi-fiduciary
17 capacity and the documents withheld reflect the information or his mental impressions
18 about the information he gathered in the course of his quasi-fiduciary duties, then the
19 attorney-client privilege is waived and no work product doctrine attaches, as he would
20 functionally be a claims adjuster. If Short acted in a dual capacity, as Ferestien appears
21 to have done, then the legal principles under *Cedell* which apply to Ferestien's
22 communication equally apply to Short's. *See supra*.

1 Finally, in Exhibit B, there is a copy of a single sheet of lined paper marked in
2 part “Atty/Client Communication – Privileged & Confidential” which neither contains
3 the name of its author nor to or for whom it was produced or sent. However, two
4 sentences of the document mention something about the investigation and coverage; the
5 other information appears to be notes on the progress of the investigation or coverage
6 more generally. Due to the ambiguities appearing in this document, the Court cannot
7 determine what, if any, protections may possibly apply under *Cedell*.

8 Prior to making its determination regarding Palmer’s motion to compel and in
9 accordance with *Cedell*, the Court requests additional briefing from Sentinel to provide it
10 the opportunity to overcome the presumption that Palmer is entitled to all the
11 aforementioned documents. *Cedell*, 176 Wn. 2d at 700. Given the standard articulated
12 above and the Court’s interpretation of *Cedell*, Sentinel must submit a brief explaining
13 whether or not *each* document from Exhibit B should be produced and provide legal
14 analysis supporting its position as to each document. This brief shall not be filed under
15 seal so that Palmer may view Sentinel’s explanations. The parties are directed to meet
16 and confer by July 17, 2013 to consider whether they can come to an agreement on the
17 production of the documents at issue. If the parties reach no agreement, Palmer shall
18 submit a brief by July 19, 2013, which explains its opposition to Sentinel’s position on
19 some or all of the documents that remain at issue.

20 Alternatively, if after reading this order, Sentinel concludes that under *Cedell* and
21 this Court’s interpretation of it, additional documents should be produced, Sentinel
22 should immediately (not later than five days after the order’s issuance) provide Palmer

1 with those documents and file a notice with the Court indicating which documents from
2 Exhibit B it has provided to Palmer.

3 **III. ORDER**

4 Therefore, it is hereby **ORDERED** that Sentinel must submit a brief, not to
5 exceed 12 pages, by July 15, 2013, in accordance with directives set forth above, unless
6 Sentinel files a notice with this Court indicating that it has produced all the Exhibit B
7 documents to Palmer. Additionally, if no agreement is reached by the parties after they
8 meet and confer as directed above, Palmer shall submit a brief by July 19, 2013, not to
9 exceed 7 pages, in opposition to Sentinel's position. Accordingly, Palmer's motion to
10 compel (Dkt. 22) is renoted for consideration on July 19, 2013.

11 Dated this 9th day of July, 2013.

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14 BENJAMIN H. SETTLE
15 United States District Judge
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